> I propose to give no opinion upon the true construction of the statute, except this: that a condition precedent to the invocation of the arbitrator on whatever grounds is that a difference between the parties should have arisen; and I think that must mean a difference of opinion before the action is launched either by formal plaint in the county court or by writ in the superior courts.

In our view the absence of a developed or fully blown dispute or difference at the date of the issue of the writ, is not a ground for refusing stay, if the court finds there is a dispute or difference, for to hold otherwise would encourage a claimant who was subject to an arbitration agreement but who did not wish to go to arbitration, to rush to court at an early stage in order to defeat the arbitration agreement.

Once it is established that there has arisen a dispute or difference or question, the language of s 6 of the Act places on the plaintiff the burden to show that it ought not to be referred to arbitration. As correctly stated by the learned judge, the fact that there is apparent weakness in the respondent's case should not be taken as an excuse to brush aside an arbitration clause to which the appellant was a party and which was being insisted on by the respondent.

Much has been said about the silence of the respondent and the failure to respond to the letters of the solicitors of the appellant addressed to the solicitors of the respondent. In our view the special relationship between the appellant and the respondent as envisaged in the provisions of the agreement reproduced earlier in the judgment, which provisions imposed on the appellant also to the duty to ensure the success of the project, destroys the effectiveness of the averments on the failure of the respondent to respond to the letters and the failure to apply for extension of time.

To summarize, once the party asking for the stay has satisfied the court that there is a dispute, difference or question between the parties within the meaning of the arbitration clause, then it is a question of exercising the discretion to grant or not to grant the stay. This discretion of the court must of course be exercised judicially and exercised according to the proper principles of law. If the appellate court is satisfied that the discretion was properly exercised, the order granted should not be disturbed.

Accordingly we dismiss the appeal with costs.

We wish to make one observation. It is regrettable that contractual provisions for arbitration can sometimes be abused. We wish to emphasize that surely it is not the intention of s 6 of the Act to confer on a defendant the privilege of delaying proceeding to enable him to put off the day of judgment indefinitely. It should be the duty of everyone involved to see that the matter be expeditiously resolved.

The learned judge in his grounds of decision has clearly expressed his view that there are triable issues and the application for summary judgment could not be entertained. He should then have dismissed the application for summary judgment. The order of stay is upheld. Deposit to respondent to account of taxed costs.

Appeal dismissed.

Solicitors: *Azman Davidson & Co; Ranjit Singh & Co.*

Reported by *Prof Ahmad Ibrahim*

Shamsuddin bin Hassan & Anor v Public Prosecutor

SUPREME COURT (KUALA LUMPUR) — CRIMINAL APPEAL NO 05-25-91
JEMURI SERJAN CJ (BORNEO), HARUN HASHIM AND MOHAMED YUSOFF SCJJ
11 SEPTEMBER 1991

Evidence — Chain of evidence — Exhibits — Charge of trafficking in dangerous drugs — Serious gaps in chain of evidence with regard to exhibits — No evidence of common intention — Conviction set aside — Penal Code (FMS Cap 45), s 34 — Dangerous Drugs Act 1952, s 39B(2)

Criminal Law — Common intention — Evidence of common intention essential — Penal Code (FMS Cap 45), s 34

In this case the appellants appealed against their conviction on a joint charge of trafficking in cannabis, an offence under s 39B(1) of the Dangerous Drugs Act 1952 ('the Act') and punishable under s 39B(2) of the Act read with s 34 of the Penal Code (FMS Cap 45) ('the Code'). The prosecution evidence was that, as a result of information received, the police on 7 March 1986 followed a Ford car from which they later saw a bundle thrown out of the left window. A policeman stopped his car and picked up the bundle. The other police cars continued to follow the Ford car which later stopped after it met with an accident. The police found the two appellants, who were husband and wife, in the car and also a 15-month-old child in the arms of the mother, the second appellant. The policeman, PW4, who picked up the bundle and the drugs, returned to the Changkat Jering Police Station where he waited for further orders. The other officers returned to Kuala Kangsar Police Station where they arrived at 1pm. Later, PW4 returned to the Kuala Kangsar Police Station arriving at 5pm. PW4 handed over the bundle and the drugs to the investigation officer at 6pm. The investigation officer handed over the drugs to the chemist for examination on 12 March 1986. The drugs that were handed over to the chemist were not marked until it was packed six days after the investigation officer received it from PW4. There was no explanation of what PW4 did with the drugs for more than five hours before he handed it over to the investigation officer.

Held, allowing the appeal:

(1) There were serious gaps in the chain of evidence with regard to the drugs thrown out of the car and the exhibits produced in court. On this ground alone, the appellants should not have been called up to enter on their defence.

(2) It is essential in relying on s 34 of the Code that there should be evidence of a common intention or evidence from which such a common intention can be inferred. The mere fact of a bundle being thrown out of a car is not evidence of common intention or evidence from which common intention can properly be inferred.

(3) In this case, there was no evidence of custody or control of the drugs to raise the presumption under s 37(d) of the Act that the appellants were in possession of the drugs, and the further presumption that they must have known that the drugs were cannabis. Until this can be proven, the presumption under s 37(da) of the Act that the appellants were trafficking in dangerous drugs did not arise.

[Bahasa Malaysia summary

Perayu-perayu di dalam kes ini telah merayu terhadap sabitan mereka atas tuduhan bersama mengedar cannabis, suatu kesalahan di bawah s 39B(1) Akta Dadah Berbahaya 1952 ('Akta itu') dan yang boleh dihukum di bawah s 39B(2) Akta itu dibaca bersama dengan s 34 Kanun Keseksaan (FMS Bab 45). Keterangan bagi pihak pendakwa menunjukkan bahawa pihak polis, setelah mendapat maklumat, telah pada 7 Mac 1986 mengikut sebuah kereta Ford dari mana mereka kemudiannya menampak suatu bungkusan dibuang dari pintu kiri. Seorang pegawai polis telah memberhentikan keretanya dan memungut bungkusan itu. Kereta-kereta polis lain telah terus mengikut kereta Ford yang kemudiannya terpaksa berhenti kerana terlibat dalam suatu kemalangan. Pihak polis telah mendapati kedua-dua perayu, iaitu suami isteri, di dalam kereta itu bersama dengan seorang bayi 15 bulan di pangkuan ibunya. Pegawai polis ('PW4') yang memungut bungkusan dan dadah itu telah pergi ke Balai Polis Changkat Jering, dan di sana ia menunggu mendapat arahan lanjut. Pegawai polis yang lain balik terus ke Balai Polis Kuala Kangsar di mana mereka sampai pada pukul 1 petang. PW4 kemudian balik ke Balai Polis Kuala Kangsar di mana dia sampai pada pukul 5 petang. PW4 kemudian menyerahkan bungkusan dan dadah itu kepada pegawai penyiasatan pada pukul 6 petang. Pegawai penyiasatan menyerahkan dadah itu kepada ahli kimia untuk diperiksa pada 12 Mac 1986. Dadah yang diserahkan kepada ahli kimia itu tidak ditanda hingga ia dibungkus enam hari selepas pegawai penyiasatan menerimanya dari PW4. Tidak ada penjelasan diberi mengenai apa yang telah dibuat oleh PW4 dengan dadah itu untuk masa lebih daripada lima jam sebelum dadah itu diserahkannya kepada pegawai penyiasatan itu.

Diputuskan, membenarkan rayuan itu:

(1) Terdapat jurang yang serius di dalam rangkaian keterangan mengenai dadah yang dibuang dari kereta dan barang kes yang dibawa ke mahkamah. Atas alasan ini sahaja pun, perayu-perayu seharusnya tidak patut diminta membela diri mereka.

(2) Adalah penting apabila hendak menggunakan s 34 Kanun Keseksaan (FMS Bab 45) bahawa terdapat keterangan niat bersama atau keterangan dari mana niat bersama itu boleh diertikan. Fakta yang bungkusan itu dibuang dari kereta itu semata-mata tidak boleh menjadi keterangan adanya niat bersama atau keterangan dari mana niat bersama boleh diertikan.

(3) Di dalam kes ini, tidak terdapat keterangan penjagaan atau kawalan dadah itu yang boleh menimbulkan anggapan di bawah s 37(d) Akta itu bahawa perayu-perayu telah memiliki dadah itu, dan anggapan selanjutnya bahawa mereka mengetahui bahawa dadah itu adalah cannabis. Sehingga keterangan itu terbukti, anggapan di bawah s 37(da) Akta itu bahawa perayu-perayu telah mengedar dadah itu tidak boleh timbul.]

Cases referred to

1 *R* v *Abbott* [1955] 2 All ER 899 (refd)
2 *Lee Yoon Choy & Ors* v *PP* [1948-49] MLJ Supp 167 (refd)
3 *Mahbub Shah* v *King-Emperor* AIR 1945 PC 118; LR 72 IA 148 (refd)

Legislation referred to

Dangerous Drugs Act 1952 ss 37(d), (da), 39B(1)(a), 39B(2)
Penal Code (FMS Cap 45) s 34

Appeal from: Criminal Trial No 58-6-86 (High Court, Ipoh)

Gurubachan Singh (*Kartar Singh* with him) for the appellants.

Dato' Stanley Isaacs (Deputy Public Prosecutor) for the respondent.

Cur Adv Vult

Harun Hashim SCJ (delivering the judgment of the court): The appellants were jointly charged with trafficking in 1,614.1g of cannabis on March 1986, an offence under s 39B(1)(a) of the Dangerous Drugs Act 1952 ('the Act') and punishable under s 39B(2) of the Act read with s 34 of the Penal Code (FMS Cap 45) ('the Code'). They were both convicted and sentenced to death by the High Court at Ipoh on 2 March 1991.

The case for the prosecution was that the police received information that a Ford Capri motor car with registration number AR 497 was carrying drugs from Taiping to Lumut. Acting on the information, the OCPD organized an ambush with four unmarked police cars and waited at the junction of Taiping-Changkat Jering roads. At about noon, a Ford Capri AR 497 was seen coming out of a petrol station and proceeded towards Trong/Bruas. Three police cars followed the Ford car. After travelling about 1½ miles, PW4, a policeman in the first car, saw a bundle being thrown out of the left window of the Ford car. He stopped his car and picked up the bundle which was a batek cloth pillow case stuffed with cannabis. The OCPD, who was driving the second car, continued to follow the Ford car and some 3½ miles away found it had come to a stop after meeting with an accident. In the car he found the appellants with a 15-month-old child in the arms of the second appellant. He placed them under arrest. Whilst there, PW4, who had collected the drugs from the roadside, arrived and showed it to the OCPD. He was directed to keep the drugs and hand it over to the investigating officer.

All the police officers except PW4 returned to the Kuala Kangsar Police Station with the appellants arriving there at about 1pm.

PW4 said he went alone to the Changkat Jering Police Station with the drugs and waited there for further orders. He eventually returned to the Kuala Kangsar Police Station arriving there at about 5pm. He waited for the investigating officer and handed over the drugs

to him at about 6pm that day. The investigating officer handed over the drugs to the chemist for examination on 12 March 1986. The drugs that were handed over to the chemist were not marked until it was packed six days after the investigating officer had received it from PW4. There was no explanation what PW4 did with the drugs for more than five hours before he handed it over to the investigating officer. We are of the view that these are serious gaps in the chain of evidence with regard to the drugs thrown out of the car and the exhibits produced in court. On this ground alone, the appellants should not have been called upon to enter into their defence.

Next, there was no evidence of common intention as intended by s 34 of the Code. All that the prosecution was able to show as that the appellants are husband and wife; that in their house were two pillows, one with a pillow case identical to that in which the drugs were found and another identical pillow was without a pillow case; and that drugs were thrown out of the car when they were both in the car. There was no evidence as to who actually threw out the bundle but it was sought to be inferred it must be the wife-appellant as the bundle was thrown out of the left side of the car, the car having only two doors and the wife-appellant sitting next to the husband-appellant who was driving the car.

Even assuming that there is no break in the chain of evidence regarding the drugs from the time of its initial recovery by the police from the roadside until its production in court at the trial, at best the evidence showed that one of the appellants must have had custody or control of the drugs to throw it out of the car. But who?

The prosecution also attempted to show that the first appellant must have known of the existence of the drugs in his car because he drove the car very fast on realizing that he was being pursued by three police cars. The police may have been chasing the first appellant's car but it does not follow that the first appellant knew he was being followed by the police. It will be recalled that all the police cars were unmarked cars. There was no siren or other indication that they were police cars. It seems obvious to us that what the police intended was to follow the first appellant's car with the objective of finding out where the drugs were being delivered to. If that was not the intention of the police, they could have very easily stopped the first appellant when he was at the petrol station or as he was coming out of it.

In *R* v *Abbott*,[1] Lord Goddard CJ cites a case at p 901:

> in which two sisters were indicted for murder, and there was evidence that they had both been in the room at the time the murder of the boy was committed; but the prosecution could not show that sister A had committed the offence or that sister B had committed the offence. Very likely one or the other must have committed it, but there was no evidence which, and although it is unfortunate that a guilty party cannot be brought to justice, it is far more important that there should not be a miscarriage of justice and that the law should be maintained that the prosecution should prove the case.

In the instant case, the learned judge has not dealt at all with s 34 of the Code in respect of common intention. Indeed s 34 of the Code was not inserted in the charge until the day the trial commenced. Be that as it may, it is essential that there should be evidence of a common intention, or evidence from which such common intention can properly be inferred, to commit the act actually committed: see *Lee Yoon Choy & Ors* v *PP*[2] quoting with approval *Mahbub Shah* v *King-Emperor*.[3] The mere fact of a bundle being thrown out of the car is not evidence of common intention or evidence from which such common intention can properly be inferred.

The learned judge has not made any finding as to who threw out the bundle from the car. There is no evidence that the pillow case stuffed with drugs were shown to the appellants after their arrest or that they were confronted with this evidence. It was contended that the presumption of knowledge under s 37(d) of the Act arose from the fact that the drugs were thrown out of the car. In our view, this fact alone is insufficient in this instance to establish control or custody. It would have been different if only one of the appellants was in the car at the material time or one of them was actually seen throwing the bundle out of the car.

There was, accordingly, no evidence of custody or control of the drugs to raise the presumption under s 37(d) of the Act that the appellants were in possession of the drugs and the further presumption that they must have known that the drugs were cannabis. Until this can be proven, the presumption under s 37(da) of the Act that the appellants were trafficking in dangerous drugs does not arise.

For the reasons stated, we allowed the appeal of both the appellants, quashed their convictions and set aside the death sentences. The appellants were accordingly acquitted and discharged.

Appeal allowed.

Solicitors: *Bachan & Kartar.*

Reported by *Prof Ahmad Ibrahim*